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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of)
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Federal-State Joint Board on)
Universal Service)
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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY
CC Docket No. 96-45

COMMENTS OF NETSCAPE COMMUNICATIONS CORPORATION

Netscape Communications Corporation ("Netscape"), by its attorneys,
respectfully submits this response to the Commission's public notice ("Notice")¹
soliciting comment on the November 8, 1996 recommended decision of the Federal-
State Joint Board on Universal Service ("Joint Board").²

INTRODUCTION

Netscape, the leading provider of client/server and related open software for
Internet applications such as the World Wide Web, has participated extensively through
comments, testimony and *ex parte* presentations in this proceeding.³ Netscape is
directly interested in development of the Commission's universal service policies and
rules under Section 254 of the Telecommunications Act of 1996.⁴ We applaud the Joint
Board for its recognition that Internet access for schools and libraries is essential to the

¹ *Common Carrier Bureau Seeks Comment on Universal Service Recommended Decision*, Public Notice, DA-96-1896 (released Nov. 18, 1996)("Notice").

² *Federal-State Board on Universal Service*, Recommended Decision, CC Docket No. 96-45, FCC 96J-3 (released Nov. 8, 1996)("Recommended Decision").

³ See, e.g., Comments of Netscape Communications Corporation (filed April 12, 1996) ("Netscape Opening Comments") <http://www.technologylaw.com/us_comm.html>. Peter F. Harter, Netscape's Public Policy Counsel, testified before the Joint Board on Internet-related issues under Section 254(h) on June 19, 1996. See also Letter from James L. Barksdale, Netscape CEO, to Reed E. Hundt, FCC Chairman, dated October 16, 1996.

use of this revolutionary new medium,⁵ and its educational benefits, by students in every classroom in America.

There are several vitally important portions of the Joint Board's recommendations regarding the Internet. First, the Joint Board has concluded that Internet services are not "telecommunications services" that should be subsidized under Section 254(h)(1)(B), but rather information services eligible for discount under the broader scope of Section 254(h)(2). This is an elegant solution—originally proposed by Netscape⁶—to the potentially untoward regulatory consequences that could arise from classifying the Internet as telecommunications in order to satisfy the narrow discounting criteria of Section 254(h)(1).⁷ Recognizing that the provisions of Section 254(h)(2) allow the Commission great flexibility (including funding authority) to "enhance access . . . to advanced telecommunications *and* information services,"⁸ the Joint Board recommends that the Commission "provide discounts for Internet access pursuant to Section 254(h)(2)."⁹ Whether or not the Commission agrees with the balance of the Joint Board's recommendations, this approach must be adopted in order to preserve continued growth and development of the Internet as a non-regulated, open, non-governmental medium.

⁴ Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996)(to be codified at 47 U.S.C. § 151 *et seq.*).

⁵ The Internet is a complex global network consisting of thousands of independent computer networks run by private businesses, government agencies and educational and research institutions. Rather than a specific kind of network, however, the Internet is actually better thought of as a set of standards or protocols that lets various types of networks intercommunicate. *See Recommended Decision*, ¶ 457, *citing* Netscape Opening Comments, at 2 n.4

⁶ *See Recommended Decision*, ¶¶ 455, 462, *citing* Netscape Opening Comments, at 8, 14-17.

⁷ *See* Comments of Netscape Communications Corporation, at 2-3 (filed Aug. 2, 1996) <http://www.technologylaw.com/us_supp.html>.

⁸ 47 U.S.C. § 254(h)(2)(emphasis supplied).

⁹ *Recommended Decision*, ¶ 463.

Second, the Joint Board has made clear that competitive and technological neutrality are principles that should be primary in the Commission's new universal service structure.¹⁰ The *Recommended Decision* also emphasizes that in implementing the provisions on school and library access to information services, such as the Internet, the Commission should not "undermine the competitive market forces that characterize the Internet access market at this time."¹¹ The Internet is one of the most purely competitive markets that has arisen in the history of communications, and its regulatory treatment must remain sensitive to the need to avoid burdening this rapidly evolving market with the weight of intrusive, outmoded regulations devised, largely in another era, for telecommunications services and carriers.

Third, the Joint Board recognizes that there are strong technological and market forces at work today that are steadily converging the functionalities available over circuit-switched telecommunications networks—the so-called Public Switched Telephone Network—and packet-switched information service networks like the Internet. Instead of yielding to the temptation to craft a new regulatory structure to replace the *Computer II* basic/enhanced distinction that has served the FCC well for nearly 20 years,¹² the Joint Board concludes that the Commission should not make

¹⁰ *Recommended Decision*, ¶ 23.

¹¹ *Recommend Decision*, ¶ 462.

¹² Netscape Opening Comments at 7-8. See, e.g., *Computer & Communications Indus. Assn. v. FCC*, 693 F.2d 198 (D.C. Cir. 1982); *Amendment of Section 64.702 of the Commission's Rules and Regulations*, Report and Order, 2 FCC Rcd. 3072 (1987); 47 C.F.R. § 64.702(a)(1995)(defining "enhanced services" as those that involve computer processing of the "format, content, code, protocol or similar aspects" of information, involve "subscriber interaction" with stored data or provide "additional, different or restructured information").

decisions on “the regulatory treatment or classification of Internet access in this proceeding,”¹³

Netscape strongly concurs with this assessment. While the parallel trends of “convergence” and “emergence”¹⁴ are pressing at the edges of *Computer II*, fair consideration of the extremely complex issues associated with regulatory classification of the Internet is impossible if they are mere afterthoughts in a more expansive universal service proceeding. The Commission could initiate a Notice of Inquiry Proceeding (i.e., “Internet I”), hold public hearings, or develop a report to Congress on necessary changes to the 1996 Act to more accurately reflect the unique functionalities of the Internet in communications policy.¹⁵ Netscape would support and participate in any and all of these endeavors, and urges the Commission to work closely with the International Telecommunications Union (“ITU”) and European Union (“EU”), for example, to ensure consistent treatment of the Internet in the global environment.

Finally, Netscape does not oppose the Joint Board’s recommendation that the Commission spend up to \$2.25 billion per year for services and equipment, including network file servers and local area networks, to bring the rich informational resources of the Internet to America’s K-12 schools and libraries. Although we endorsed the Administration’s “E-Rate” proposal for free Internet access, the *Recommended Decision*

¹³ *Recommended Decision*, ¶ 464.

¹⁴ It is becoming almost a truism to say that the functionalities of circuit-switched telephone networks and the packet-switched Internet are converging (for instance, with Internet telephony allowing voice communications). Less commonly discussed is that the expansion of applications on the Internet is driving the emergence of a new medium, with unique economic and social characteristics, and with new opportunities for commerce, communication and education. In many ways, this “emergence” trend is more important to the Internet itself as a commercial market and global network.

calls for schools to have at least a minimal financial stake in their discounted services and equipment as a means of encouraging efficient usage of universal service funds.¹⁶ This is not an unreasonable approach, and combined with the Joint Board's preference for competitive bidding—with RFPs posted to a Web site for all interested vendors to obtain easily—should help create a robust, efficient and highly competitive market for Internet access and education technology.¹⁷

Despite the Joint Board's sensitivity to Internet regulatory classification and competitiveness, there are several troubling aspects of the *Recommended Decision*. The two most significant of these are (1) the Joint Board's conclusion that the Commission should distinguish between Internet "conduit" and "content" for purposes of distributing Section 254(h) discounts,¹⁸ and (2) its recommendation that only telecommunications carriers are obligated to contribute to the universal service fund for purposes of K-12 schools and libraries. *Recommended Decision*, ¶ 790.

¹⁵ *Recommended Decision*, ¶ 790 ("[T]he Commission should re-evaluate which services qualify as information services in the near future to take into account changes in technology and the regulatory environment.")

¹⁶ *Id.* ¶ 551.

¹⁷ Netscape makes available its client and server software free of charge to qualifying schools < http://www.netscape.com/comprod/sales/educar_faq.html#1>. Nonetheless, we think it advisable that the Commission clarify that the "network file servers" recommended for discounting for K-12 schools and libraries include file server software, such as Internet server software, necessary to allow school LANs to communicate over the Internet. See *Recommended Decision*, ¶ 477.

¹⁸ The Joint Board's treatment of Internet access purports to eschew "disaggregat[ing] the network transmission component of Internet access from the information service component." *Recommended Decision*, ¶ 462. Nonetheless, the *Recommended Decision* appears to do just that by differentiating "basic conduit access" from Internet "content" for purposes of K-12 school discounts. According to the Joint Board, "Internet access" includes "the communications link to the ISP, whether through dial-up access or via a leased line, and the subscription fee paid to the ISP, if applicable." *Id.* Characterizing this aspect of Internet access as the so-called "basic" charge for Internet access, the Joint Board resists allowing schools to apply Section 254(h) discounts to an ISP that "bundles" access with Internet "content," recommending that schools can apply discounts to "some minimal amount of content, but only under those circumstances in which the ISP basic subscription charge represented the most cost-effective method for the school or library to secure non-content conduit access to the Internet." *Id.*

Netscape does not believe that either of these two approaches is sustainable in the long term. The conduit/content distinction, while ambiguous, has no meaningful definition in the Internet environment or obvious application to the functionalities and services available today from Internet Service Providers ("ISPs") and Online Service Providers ("OSPs").¹⁹ A far better approach is to differentiate Internet access (the transport function) from Internet services (the enhanced communications function), and allow schools and libraries to secure the former at discounted rates. Under this approach, any provider offering dedicated transport facilities (T-1, 56 Kbps, frame relay, etc.) linking a user to the Internet would be considered, to that extent, to be providing "telecommunications services" subject to discount under Section 254(h). At the same time, no discounts would be provided for Internet "subscriptions," regardless of content origination, because those aspects of Internet services are clearly enhanced.²⁰ Netscape has explored this model with Commission Staff, and will develop a more formal proposal for submission to the Commission for its consideration as an alternative to the Joint Board approach.²¹

¹⁹ Online Service Providers like America Online and the Microsoft Network package proprietary content with Internet access. It is difficult to rationalize paying for any "content" as part of universal service policies, but the Joint Board's "minimal content" criterion illustrates its essentially *ad hoc* approach to treatment of Internet access. Indeed, as ISPs increasingly add content—for instance Internet directories, search engines, user-configurable real-time information distribution, etc.—to their services, it is likely that the "conduit/content" distinction itself will be overtaken by market developments well before most American schools can take advantage of Section 254(h) discounts themselves.

²⁰ Thus, where a school purchased a T-1 facility for Internet access, the price for the T-1 would be discounted. Conversely, any monthly "subscription" charge for Internet services would *not* be subject to discounting, because these charges are for information services, not transport. In this way, whether Internet access were provisioned by an ISP, OSP, LEC, IXC or other provider, all would be subject to identical universal service rights and obligations. At the same time, none of the aspects of Internet service that make the Internet an "enhanced" communications medium would be subject to inclusion in the Section 254 discount program.

²¹ The *Recommended Decision* also fails to deal with the jurisdictional issues involved in Internet access. The telecommunications services underlying Internet access, whether dedicated or dial-up, are (Footnote continued on next page)

The second problem with the Joint Board's recommendation is that it allows some, but not all, providers of Internet access to avoid universal service support obligations. Requiring only one category of Internet access provider to contribute to the universal service fund, while allowing all such providers to receive universal service subsidies, is simply not a competitively or technologically neutral outcome. Proper universal service policy for K-12 schools and libraries compels that all communications providers—regardless of regulatory classification—both contribute to and receive support from a “universal” universal service support system.²²

The Joint Board felt compelled to exclude ISPs and OSPs from universal service obligations because of the language of the Act, which limits universal service assessments to “telecommunications carriers” and other providers of “telecommunications services.”²³ Yet the reality is that both telecommunications carriers (RBOCs, IXC, etc.) and enhanced providers (ISPs, ESPs, etc.) are competing vigorously in the Internet market today, and will be competing to provide Internet access to K-12 schools and libraries tomorrow. A situation in which only the former have universal service payment obligations is precarious, at best, and open to substantial legal challenge, at worst. Moreover, since the Joint Board has recommended that universal service payments be based on “net” telecommunications revenues (less payments to other

arguably “intrastate,” and thus beyond the scope of the Commission’s Section 254(h) authority. For this reason, Netscape proposed that the Commission use its traditional jurisdictional allocation rules to classify Internet access as an interstate service, since virtually all Internet communications cross state (and frequently national) boundaries. *Recommended Decision*, ¶ 534, citing Netscape Opening Comments, at 20-21. Without this sort of preemption of state authority, the Commission’s Internet-related decisions under Section 254(h) may draw unnecessary legal challenge, compromising the goal, which Netscape shares, of making Internet access available universally to U.S. K-12 schools and libraries.

²² Netscape Opening Comments, at iii, 18.

²³ *Recommended Decision*, ¶ 790.

carriers), the financial consequences of including ISPs and OSPs in the subsidy pool for Section 254(h) purposes would not have any ill effects on the profitability or competitiveness of those industries.²⁴

Netscape recognizes the Joint Board struggled to adhere to the law while creating a competitively and technologically neutral system. However, the structure it has proposed is competitively neutral only in that ISPs and OSPs are not foreclosed from competing for the K-12 market. Just as it would be inequitable and anticompetitive for Section 254(h) subsidies to be limited to telecommunications carriers, so too is it poor policy to limit payment of the subsidy support to telecommunications carriers. If the Commission adopts Netscape's access/service model—effectively “disaggregating” Internet services into their telecommunications and information service functions—then this problem would be mitigated or eliminated. If not, then either the Commission or Congress will need to act rapidly to create a more balanced approach to universal service obligations for K-12 schools and libraries.

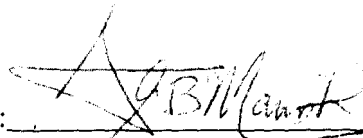
CONCLUSION

The Commission must be sensitive to the unique legal, economic and competitive market structure of the Internet in fashioning universal service policies under Section 254 of the Act. The Joint Board's recommendations on Internet access for schools and libraries have several vital findings, but in a sense do not grapple with the harder questions associated with the Internet. Netscape believes the Commission

²⁴ Thus, for instance, if an ISP sold a T-1 to a corporate customer, those revenues would be counted for universal service purposes, but would be offset by the cost paid by the ISP to a LEC or IXC for the underlying telecommunications facility it has resold.

should endeavor, in this proceeding if possible, to resolve the classification and support payment issues that the Joint Board's *Recommended Decision* avoids, because the Internet can only benefit from vigorous, unrestrained competition among all potential providers of Internet access.

Respectfully submitted,

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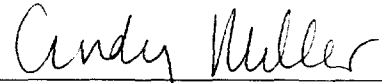
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Dated: December 19, 1996

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